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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

STEPHEN A. KNOX,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF OF AMERICAN BOOKSELLERS FOUNDATION FOR FREE EXPRESSION, COUNCIL FOR PERIODICAL DISTRIBUTORS ASSOCIATIONS, NATIONAL ASSOCIATION OF ARTISTS' ORGANIZATIONS, PERIODICAL AND BOOK ASSOCIATION OF AMERICA, INC. AND APERTURE FOUNDATION, INC., AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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STATEMENT

The American Booksellers Foundation for Free Expression, the Council for Periodical Distributors Associations, the National Association of Artists' Organizations, the Periodical and Book Association of America, Inc. and Aperture Foundation, Inc. submit this joint brief urging reversal of the decision below. This brief is submitted upon the written consents of counsel to both petitioner and respondent, which are submitted herewith.

THE *AMICI*

The American Booksellers Foundation for Free Expression ("ABFFE") was organized in 1990. The purpose of ABFFE is to inform and educate booksellers, other members of the book industry, and the public about the dangers of censorship and to promote and protect the free expression of ideas, particularly freedom in the choice of reading materials.

The Council for Periodical Distributors Associations is the national trade association for approximately 400 independent local wholesale distributors who distribute over ninety-five percent of all magazines, comic books, paperback books and newspapers in every state of the United States.

The National Association of Artists' Organizations ("Artists' Organizations") is a non-profit, membership service organization dedicated to serving and promoting non-profit organizations engaged in the presentation and support of new and contemporary work on the visual, performing, literary, media, and interdisciplinary arts. Artists' Organizations constitute the primary presenters, supporters, and makers of new and evolving art in America.

The Periodical and Book Association of America, Inc. is an association of magazine and paperback book publishers who

rely on newsstand sales and who distribute magazines and books through independent national distributors, wholesalers and retailers throughout the United States and Canada.

Aperture Foundation, Inc., a not-for-profit corporation, was founded over 40 years ago to foster the fine art of photography. Aperture is dedicated to the presentation of distinguished historical and contemporary photography and to the study of new photographic media, through publishing, exhibitions, research, education and preservation.

INTEREST OF THE *AMICI*

The *amici*'s members publish, produce, distribute and sell books, magazines, videos, works of art and printed materials of all types, including those that are scholarly, literary, artistic, scientific and entertaining. Because *amici's* members include artists, distributors and booksellers who create, distribute and sell popular and potentially provactive literary, scientific and scholarly books and periodicals and art, they have a significant interest in the resolution of the issue before the Court. *Amici*'s members do not own what are commonly referred to as "adult" retail stores; nor do they distribute the "adult" materials that are generally found in such stores. *Amici*'s members do, however, create, distribute and sell mainstream materials that include photographs or depictions of clothed teenagers and younger children in poses that may be considered, in light of the Third Circuit's opinion, lascivious.

Child pornography is properly denounced. Thus, violations of 18 U.S.C. § 2256(2)(E) carry with them enormous social stigma and censure. Until the Third Circuit's ruling, however, *amici*'s members, in their attempts to comply with the statute, could take some limited comfort from the statute's requirement of nudity in determining whether a "lascivious exhibition of the genitals or pubic area" had occurred. The Third Circuit's erroneous conclusion that, under 18 U.S.C.

§ 2256(2)(E), a "lascivious exhibition of the genitals or pubic area" can include clothed minors removes that safe harbor and raises the spectre that *amici*'s members could unwittingly suffer the sting and censure associated with the statute's violation simply by selling provocative materials.

The Third Circuit's expansive reading of the statute places *amici*'s members in a precarious position. Prior to this case, the statute provided the necessary "bright line" test. If the material did not include pictures of sexual conduct or nudity, a distributor or retailer needed to look no further. After *Knox*, a distributor or retailer in the Third Circuit, even absent nudity or sexual conduct, must consider whether photographs include persons under eighteen, and speculate about the effect of such depictions and images upon a reader, as well as about the communicative intent of a publisher of those depictions and images. The Third Circuit has exchanged an arguably workable requirement of "nudity plus" for a test that impermissibly violates the teachings of this Court, the statute and its legislative history; the impact of this erroneous interpretation will be felt by *amici*'s members.

SUMMARY OF ARGUMENT

This appeal raises a question of first impression: can photographic images of fully clothed minors engaged in no sexual activity be the basis of a criminal conviction under 18 U.S.C. § 2252(a)(2) and (4)? The Third Circuit held that petitioner Stephen A. Knox, an honors graduate student in history at Penn State University, violated these statutes by possessing three videotapes purportedly containing "lascivious exhibition of the genitals or pubic areas," although it is undisputed that none of the tapes contained nudity and all minors depicted wore bathing suits, cheerleading outfits, leotards or skirts. The Third Circuit expressly conceded that its holding applied an "expansive" definition of the statutory requirement of an "exhibition." Under that acknowledged "expansive" holding, an "exhibition" can occur when the genitals or pubic

area are fully clothed and those body parts cannot actually be seen by anyone.

The Third Circuit's decision is based on an erroneous interpretation of the statute and its legislative history. The Third Circuit found a violation of the statute based on its "subjective inquiry into whether or not the material is intended to elicit a sexual response from the viewer" — a breathlessly broad inquiry that goes far beyond the language of the statute and impermissibly criminalizes speech protected by the First Amendment. Further, in dispensing with the generally accepted requirement of either nudity or sexual conduct, the Third Circuit misinterprets the statute's legislative history. In support of the Third Circuit's incorrect conclusion that Congress intended to eliminate the nudity requirement, the court erroneously cited a change to the bill, that in fact was intended to ensure that mere nudity without more would not constitute a statutory violation. Finally, the Third Circuit's conceded "expansive" statutory interpretation comports neither with the rule of lenity nor established First Amendment principles of statutory construction.

The Third Circuit's opinion also ignores the straightforward guidance of the leading case on this subject, *New York v. Ferber*, 458 U.S. 747 (1982). Had Congress meant to include photographs of clothed children not involved in sexual conduct within the definition of child pornography, as the Third Circuit has held, such a definition would be beyond the scope of material permitted by *Ferber* to be regulated or banned. *Ferber* defined child pornography as depictions of sexual conduct involving live performance or visual reproduction of live performances. In *Ferber*, this Court specifically discussed the concept of lewd or lascivious exhibition of the genitals, relating it to language in *Miller v. California*, 413 U.S. 15 (1973). The concept of lewd exhibition of clothed genitals is unique to the decision below, and not within the compass of the *Ferber* doctrine.

The Third Circuit's opinion raises serious concerns and the risk of ruinous prosecutions for the mainstream *amici* before this Court. With the removal of nudity as a requirement to a finding of "exhibition," the Third Circuit has significantly expanded the range of materials — books of fine photographs, medical texts, music videos, videos of aerobics, dance and sporting displays, catalogues and even family pictures — which arguably become criminal to own, much less to sell. By its focus on the intended sexual response of the viewer, the Third Circuit's opinion criminalizes non-obscene material that artists create, simply because it is provocative to some.

ARGUMENT

I. THE THIRD CIRCUIT'S CONCLUSION MISCONSTRUES CONGRESS' CLEAR INTENT THAT A DEPICTION OF FULLY COVERED GENITALS AND PUBIC AREA CANNOT CONSTITUTE AN "EXHIBITION OF THE GENITALS OR PUBIC AREA" UNDER 18 U.S.C. § 2256(2)(E).

A. At a Minimum, the Statute Requires Nudity to Constitute "Lascivious Exhibitions of the Genitals or Pubic Area."

Congress' unequivocal intent in enacting 18 U.S.C. § 2256(2)(E) was to preserve constitutionally-protected speech by limiting "lascivious exhibitions" to depictions that include lascivious behavior in addition to nudity. A review of both the statutory language and its legislative history reveals that Congress never intended to criminalize depictions in which the genitals and pubic area are completely clothed.

The statutory language itself evinces Congress' requirement that, to be considered "sexually explicit conduct," a "lascivious exhibition" involves at a minimum a nude depiction of the genitals or pubic area. "Exhibit" means "to show or

display outwardly by visible signs or actions." *Webster's Ninth New Collegiate Dictionary* (Merriam-Webster Inc. 1985). It would be a strange "art exhibition" if all the pictures were hidden by cloth covers. The Third Circuit's conclusion criminalizing depictions of the covered genitals or pubic area, *United States v. Knox*, PA 17,[1] thus contradicts the statutory language because covered depictions are not "outward" displays in which the genitals or pubic area are "visible."

The statute lists "lascivious exhibition of the genitals or pubic area" as one of five examples of proscribed sexually explicit conduct, along with actual or simulated sexual intercourse, bestiality, masturbation and sadistic or masochistic abuse. 18 U.S.C. § 2256(2)(A)-(E). In order to rise to the level of sexual conduct proscribed by Congress, "lascivious exhibition of the genitals or pubic area" must, by its nature, be as explicit as the other defined, sexual acts. The Third Circuit's interpretation proscribing non-nude depictions falls outside the rubric of sexually-explicit conduct prohibited by the statute.

Congress' intent to criminalize depictions containing, at a minimum, nudity and lascivious behavior is further evidenced by the statute's legislative history. Congress specifically addressed and rejected as overbroad standards virtually identical to the one adopted by the Third Circuit. Indeed, Congress made clear that nudity was not only a requirement; nudity alone was insufficient. Something more, a "lascivious exhibition of the genitals and pubic area" was required.

S. 1011 (the "Roth" bill), the original legislative proposal that led to 18 U.S.C. §§ 2251-2257, would have prohibited "[n]udity, if such nudity is to be depicted for the purpose of sexual stimulation or gratification of any individual who may

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[1] References to the Third Circuit's opinion shall cite to Petitioner's Appendix to Petition for Certiorari, taking the form "PA __."

view such depiction." S. Rep. No. 95-438, 95th Cong., 2d Sess. (1977), *reprinted in* 1978 U.S.C.C.A.N. 40, 48-49 (hereinafter "S. Rep. No. 95-438 at __"). Congress rejected that nudity standard specifically because it was overly broad. The Senate report recommending passage of the revised bill warned that the nudity standard was "so broad that it could conceivably prohibit such innocent scenes as 'skinny dipping' or even nude snapshots of babies that were mailed to grandparents." *Id.* The Honorable Edward I. Koch, then a Representative from New York, also testified that he would not endorse the nudity standard "because [he was] *concerned about the breadth* of [that] term[]." Cong. Rec. E3419 (daily ed. June 1, 1977) (emphasis added). The Committee on the Judiciary, reporting on the bill, recommended that Congress reject the original bill because "there was a very strong possibility that the courts would declare this section unconstitutional on its face." S. Rep. No. 95-438 at 49.

Thus, Congress expressly discarded the overly-broad nudity requirement in favor of a narrower standard; in no way did Congress "repudiate[ ] its earlier intention to confine the statute's coverage to nude exhibitions," as the Third Circuit held. *Knox*, PA 12-13. The interpretation adopted by the Third Circuit is precisely the type of prohibition both feared and rejected by Congress when it laboriously considered the statute, and will endanger creators, publishers and producers of valuable or mainstream works of art and literature.

The legislative history of 18 U.S.C. § 2256(2)(E) reveals that Congress never considered including non-nude depictions within the scope of the statute. Debate focused instead on which subset of nude depictions fell within the statute's reach. For example, Assistant Attorney General Patricia Wald, in a letter to the Chair of the Judiciary Committee, proposed that the language, subsequently adopted, requiring "lewd [now, lascivious] exhibitions of the genitals" be substituted for "nudity." S. Rep. No. 95-438 at 63 (letter from Assistant Attorney General Patricia M. Wald to Senator James O. Eastland). The

new language was intended to enable Congress to "make clear in the legislative history of the bill what types of nude portrayals of children were intended to be encompassed" within the statutory definition. *Id.*[2] The extensive debates throughout the statute's history do not include a single reference to criminalizing non-nude depictions.[3] The statute must not be read to prohibit non-nude depictions when Congress never considered such a broad application.

Even the prosecutors who testified before Congress, as it considered amendments to the statute, understood 18 U.S.C. § 2256(2)(E) to require more, not less, than mere nudity. Robert Pittler, Bureau Chief of New York's District Attorney's Appeals Bureau, testified that "'lewd exhibition of the genitals' . . . means more than mere nudity and describes a patently offensive, lascivious, lustful or obscene display." *Hearings on S. 2856 Before the Subcommittee on Juvenile Justice of the*

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[2] As an additional example, in the 1984 hearings addressing an amendment that would define "simulated" sexually explicit conduct, Mark M. Richard, Deputy Assistant Attorney General of the Criminal Division, testified on behalf of the Department of Justice that "simulated" sexual activity should be defined to include *off-camera* depictions "of any *uncovered* portion of the genitals or buttocks." Legislative History, Child Protection Act of 1984, House Rep. No. 98-536, *reprinted in* 1984 U.S.C.C.A.N. 492, 504 (emphasis added). Thus, the debate again concerned whether a subset of nude depictions, those "out of view of the camera," could be criminalized, not whether to prohibit non-nude depictions.

[3] *See, e.g., Protection of Children Against Sexual Exploitation Act of 1977*, Legislative History, 95th Cong., 2d Sess. (1977), *reprinted in* 1978 U.S.C.C.A.N. 40; *Hearings on S. 2856 Before the Subcommittee on Juvenile Justice, a Bill to Amend the Sexual Exploitation of Children Act of 1977*, 97th Cong., 2d Sess. (1982); *Child Protection Act of 1984*, Legislative History, 98th Cong., 1st Sess. (1984), *reprinted in* 1984 U.S.C.C.A.N. 492; *Child Sexual Abuse and Pornography Act of 1986*, 99th Cong., 2d Sess. (1986), *reprinted in* 1986 U.S.C.C.A.N. 5952.

Committee on the Judiciary, 97th Cong., 2d Sess. 111 (1982). He reiterated this point several times during his testimony, emphasizing that excluding "mere nudity" from the statute helped insure its constitutional application:

> it is important to re-emphasize that neither the present federal statute nor the proposed amendments would encompass acts of *simple nudity*, although there is a prohibition of lewd [now lascivious] exhibition of the genitals. Under the federal statute, *nudity would be encompassed only when it is accompanied by simulated sexual conduct, that is, the explicit depiction of the enumerated acts.*
> * * * By not prohibiting *simple nudity*, the federal statute, like other state counterparts would allow producers ample room to express an idea, convey a message or tell a story about the sexual conduct of children.

Id. at 115-16 (emphasis added).

Similarly, the United States, in other prosecutorial settings, has likewise conceded that nudity is, at a minimum, a requirement here. In litigation concerning the record-keeping provisions of 18 U.S.C. §§ 2251-2257, the United States, through the Justice Department, represented that the statute "does not apply to full frontal nudity. It applies to a very narrow category of lascivious exhibitions of the genitals or pubic area." *American Library Assoc. v. Thornburgh*, No. 89-661 at 42 (D.D.C. 1989) (transcript of April 25, 1989 preliminary injunction hearing). Certainly, if "simple nudity," or even "full frontal nudity," was not to be criminalized according to the government's own interpretation in other contexts, the Third Circuit's prohibition of non-nude depictions flatly contravenes all reasonable interpretations of the statute and its legislative history.

B. Statutory Construction Rules and The Rule of Lenity Likewise Compel Reversal of the Third Circuit.

Established rules of statutory construction require the Court to honor Congress' clear intent to adopt a more restrictive standard that would exclude non-nude depictions from the statute's reach. Where "resolution of a question of federal law turns on a statute and the intention of Congress, we look first to the statutory language and then to the legislative history if the statutory language is unclear." *Blum v. Stenson*, 465 U.S. 886, 896 (1984). Not only does the Third Circuit's interpretation ignore and contradict Congress' expressed intent to replace the nudity standard with a narrower requirement, it lacks any basis in the statute's extensive legislative history. (*See* Section I.A.) Such a construction violates the judiciary's mandate to honor Congressional intent and jeopardizes the freedom of creators, publishers, producers and sellers of protected materials. *See id.*; *see also Brock v. Pierce County*, 476 U.S. 253, 261-65 (1986) (evaluating Congress' intent when construing statute); *Grove City College v. Bell*, 465 U.S. 555, 563-71 (1984) (evaluating "powerful evidence of Congress' intent" when construing statute).

Further, the Third Circuit's interpretation ignores the time-honored rule that any "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *Liparota v. United States*, 471 U.S. 419, 427 (1985) (citations omitted). *Accord United States v. Thompson/Center Arms Co.*, 112 S. Ct. 2102, 2110 n.10 (1992); *Crandon v. United States*, 494 U.S. 152, 158 (1990). Where criminal sanctions are involved, a "fair warning" must be given of what behavior the law will punish. *United States v. Bass*, 404 U.S. 336, 347-48 (1971). The severity of criminal penalties and the accompanying moral condemnation require legislatures and not courts to define criminal activity. *Id.* "Thus, where there is ambiguity in a criminal statute, doubts are resolved in favor of the defendant." *Id.* Consequently, here, absent any statutory or legislative

authority to criminalize non-nude depictions, the Court must review and reverse the Third Circuit's novel and concededly "expansive" statutory construction. To do otherwise would entangle the Court in the realm of the legislature and would expose unwitting members of *amici* to criminal prosecution without fair warning.

II. THE THIRD CIRCUIT'S OPINION UNCONSTITUTIONALLY EXPANDS THE DEFINITION OF CHILD PORNOGRAPHY BEYOND THAT DECLARED UNPROTECTED IN *FERBER*.

Free speech is essential for the survival of democratic institutions. The First Amendment protects citizens from governmental abridgment of the fundamental right to free speech. Through the years, this Court has specifically defined a limited group of categories of speech that are not protected by the First Amendment. In *New York v. Ferber*, 458 U.S. 747 (1982), this Court added another category to that group by holding that the state has an interest in, and is not constitutionally barred from, regulating non-obscene pornographic depictions of children.

The compelling justification relied on by this Court in *Ferber* to exclude non-obscene depictions of children from the protection of the First Amendment was the need to prevent the sexual abuse of children. *Id.* at 756-64. The expansive definition imposed by the Third Circuit goes beyond the strict limitations imposed in *Ferber* to include depictions where the actions of the minor are neither sexual acts nor lewd, and would not constitute child abuse. Moreover, and particularly important for *amici*'s members as they attempt to comply with the statute, the Third Circuit shifts from applying an objective inquiry to determine the legality of depiction to an exploration of the subjective effect on the observer.

In *Ferber*, the Court specifically required that any legislation proscribing sexually explicit depictions of children (1) expressly define the conduct to be prohibited by applicable state law as written or authoritatively construed, (2) be limited to works that visually depict "sexual conduct" by children below a specified age, (3) suitably limit and describe the sexual conduct proscribed and (4) impose an element of scienter on the part of the defendant.[4] *Id.* at 764-65.

Applying these standards in *Ferber*, the Court found that New York could regulate depictions of "actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, sado-masochistic abuse, or lewd exhibition of the genitals" because the "forbidden acts to be depicted [were] listed with sufficient precision and represented conduct. . . that could render it legally obscene." *Id.* at 765. Regulation of works depicting sexual conduct involving "lewd exhibition of the genitals" was permitted because the Court concluded that the scope of that term was both known and permissible. *Id.*

The Third Circuit's analysis violates *Ferber*'s restrictions in two ways: first, by eliminating the requirement of nudity and re-defining the term "exhibition," and, second, by focusing on lasciviousness as the "limiting principle" in the phrase "lascivious exhibition of genitals or pubic area." As a result of these two misapplications of the statute, the Third Circuit has effectively nullified the *Ferber* requirement that categories of sexual conduct be suitably limited and described. *Knox*, PA 19. Further, under the Third Circuit's questionable logic, lasciviousness is a "subjective inquiry into whether or not the material is intended to elicit a sexual response from the viewer." *Id.* If lasciviousness can only be determined by an inquiry into the

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[4] This Court also requires states regulating obscenity to define and describe specifically the sexual conduct being targeted. *Miller v. California*, 413 U.S. 15, 24 (1973).

producer's intent and viewer's reaction, there is no objective structure available to a person reviewing depictions of minors to determine whether those depictions could be deemed child pornography and, thus, fall outside the First Amendment's protection.

The Third Circuit's expansive and subjective inquiry has rendered irrelevant the accepted meaning of "lascivious exhibition of the genitals or pubic area." By defining fully clothed depictions "of the genitals or pubic area" as an exhibition, the Third Circuit ignored the limitations imposed in *Ferber* and created an atmosphere of definitional uncertainty reminiscent of the pre-*Miller* obscenity period when there was no viable standard.[5]

In both *Ferber* and *Miller*, this Court emphasized the need for specificity and definition when regulating depictions of sexual conduct. *Ferber*, 458 U.S. at 764; *Miller*, 413 U.S. at 24. The Third Circuit decision causes the federal statute no longer to meet the *Ferber* requirements of specificity and definition, since it defines "exhibition of genitals or pubic area" as including certain depictions of fully-clothed genitals or pubic areas, based upon their perceived subjective impact on a given individual or group of individuals. *Knox*, PA 17-19. Once the requirement of nudity is removed, a wide range of materials — books of fine photographs, medical texts, music videos, videos

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[5] In addition, the Third Circuit's decision raises a legitimate question with respect to defendant's scienter; before that decision, viewers could reasonably assume clothed depictions of the genitals and pubic area were protected speech. *Cf. United States v. X-Citement Video, Inc.*, Nos. 89-50556, 89-50562, 1992 U.S. App. LEXIS 32542, at *18-24 (9th Cir. Dec. 16, 1992) (finding that lack of scienter requirement renders 18 U.S.C. § 2252, prohibiting distribution, shipping or receipt of child pornography, facially unconstitutional).

of aerobics, dance and sporting displays, catalogues and even family pictures — could fall within the class of child pornography and thus be criminal.

The Third Circuit's expansion goes beyond creating an ambiguous definition of what is banned. This Court allowed New York to ban lewd exhibition of genitals, even though such exhibition did not involve a sexual act, because such an exhibition rose to the level of "sexual conduct." *Ferber*, 458 U.S. at 765. In *Ferber*, when discussing the inclusion of "lewd exhibition of the genitals" as a proper regulation, the Court refers to *Miller*, stating that it was a known and permissible regulation. *Id.* Both sex and nudity were expressly involved in *Miller*. In *Miller*, as in *Ferber*, this Court was attempting to establish clear criteria for states which sought to set limits on the depictions of both "sex and nudity." 413 U.S. at 23-25. Indeed, the Court, shortly after discussing examples of permissible regulation, stated, "[s]ex and nudity may not be exploited without limit by films or pictures exhibited or sold in places of public accommodation any more than live sex and nudity can be exhibited or sold without limit in such public places." *Id.* at 25-26.

While nudity can certainly be an aspect of a depiction which is obscene or child pornography, this Court has held that nudity, without more, is protected by the First Amendment. *Osborne v. Ohio*, 495 U.S. 103, 112 (1990). Nudity is inherent in the understanding of lewd or lascivious exhibition of the genitals or pubic area. In *Osborne*, this Court discussed the constitutionality of a statute that sought to criminalize possession of material depicting a minor in "the state of nudity, where such nudity constitutes a lewd exhibition or involves graphic focus on the genitals." *Id.* While Justice Brennan in his dissent sought to strike down the statute for its expansive criminalization of "lewd exhibitions of *nudity*" as opposed to "lewd exhibition of *the genitals*," this Court stated that the critical question is not which parts of the body are *nude* but whether the *nudity* was lewd, for even nude exhibition of the genitals without more would be constitutionally protected. *Id.* at 114 n.11.

The Third Circuit, however, confuses this constitutional mandate, even though one of its earlier holdings specifically recognized that "more than mere nudity" was required for a violation of the federal statute. *United States v. Villard*, 885 F.2d 117, 121 (3d Cir. 1989). In *Villard*, the Third Circuit recognized that the term "lascivious exhibition" was not as specific as the other types of sexually-explicit conduct listed in § 2256(2)(A)-(E). As a result of the term's less-than-definite meaning, the Third Circuit parsed the words "lascivious exhibition," and concluded that "the statute makes clear that the depictions must consist of more than merely nudity; otherwise inclusion of the word 'lascivious' in the statute would be meaningless." *Villard*, 885 F.2d at 121.

In *Knox*, the Third Circuit disregards the requirement of nudity, and ignores its own holding in *Villard*, by stating that "[t]he requirement of more than mere nudity does not mean . . . that nudity is a prerequisite to the existence of an exhibition; rather, *Villard* simply stated the obvious principle that nudity alone is insufficient to constitute a *lascivious* exhibition." *Knox*, PA 16 (emphasis in original). While the Third Circuit is correct when it says nudity alone is insufficient to constitute a lascivious exhibition, it is incorrect and goes beyond any prior holding when it proscribes depictions involving no nudity or sexual conduct at all.

The basis of the proscription in *Ferber* is the protection of minors from sexual abuse. The Third Circuit's unprecedented interpretation, focusing on subjective intent and effect, ultimately eliminates the requirement of sexual conduct and thus ignores the very justification for regulating child pornography — preventing sexual abuse of minors. This is a retreat from the rationale of *Ferber*. Moreover, by focusing the criminal inquiry on the subjective determination of lasciviousness, the Third Circuit has taken a leap backward toward the discredited rule of *Regina v. Hicklin*, L.R., 3 Q.B. 360 (1868), which looked to the

impact of parts of the work on susceptible individuals. It also is an incorrect and impermissible retreat from the teaching of both *Ferber* and *Miller* requiring specificity of definition and, accordingly, the decision below should be reversed.

III. 18 U.S.C. § 2256 AS INTERPRETED BY THE THIRD CIRCUIT IS VAGUE AND OVERBROAD.

If the Third Circuit ruling stands, "persons whose expression is constitutionally protected may well refrain from exercising their rights for fear of criminal sanctions by a statute susceptible of application to protected expression." *Ferber*, 458 U.S. at 768-69 (quoting *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 634 (1980)). The potential overbreadth is substantial. Any depiction of a child that could be considered sexual in nature would be criminalized. Minors in bathing suits, cheerleading outfits, leotards, skirts, or any attire at all could fall within the statute's scope. The only qualifying element would be whether the depiction is lascivious, which under the decision below is determined in terms of the intent of the producer and the effect on the recipient. A wholesaler, bookstore or video store is thus left with the impossible burden of guessing intent and effect, with the spectre of a criminal child pornography indictment looming over them. Prior to *Knox*, these mainstream businesspersons had a bright line test — sexual conduct or nudity triggered further scrutiny. If the decision below stands, this appropriate and necessary protection is no longer available.

CONCLUSION

For the reasons set forth above, *amici* urge the Court to grant certiorari in this case.

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Respectfully submitted,

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